



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1940.

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No. \_\_\_\_\_

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RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA  
RAILWAY, INC., NORTHERN INDIANA RAILWAY,  
INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,  
*Petitioners,*

*against*

ABBOTT LAWRENCE MILLS,  
*Respondent.*

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

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**The Opinions of the Court Below.**

The opinion of the Circuit Court of Appeals affirming the judgment of the District Court in dismissing the plaintiff's suit is printed at pages 144-152 of the record.

The opinion of said Court in reversing the judgment of the District Court is printed at pages 154-156 of the record.

**Jurisdiction.**

Application is made under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Sec. 1; 28 U. S. C. A. 347) for a writ of certiorari to review a final judgment against the petitioners by the Cir-

cuit Court of Appeals for the Seventh Circuit on June 28, 1940 (R. 154-156). The first judgment of said Court was entered January 22, 1940, to which these petitioners filed a petition for a rehearing which was denied by said Court in its opinion of June 28, 1940 (R. 153); this petition for review on writ of certiorari is presented September ....., 1940.

### **Statement.**

A summary of the facts is stated in the petition at pages 1 to 8.

### **POINT I.**

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver After His Discharge Is Not Void, Is in Conflict With Its Own Prior Decision and With Decisions of Other Circuit Courts of Appeals.**

*Shepherd v. St. Louis Public Service Co.*, 64 Fed. (2) 612, 8th C.

*Peters v. Plains Petroleum Co.*, 43 Fed. (2) 49, 10th C.

*Western New York & P. R. Co. v. Penn Refining Co.*, 137 Fed. 343, 368, 3rd C.

*Gray v. Grand Trunk W. Ry. Co.*, 156 Fed. 736, 743, 7th C.

Plaintiff's action for damages was brought in the State Court against the Receiver of the Chicago, South Bend & Northern Indiana Railway Company only; while it was pending and on November 9, 1929 the District Court entered a foreclosure decree ordering the sale of all the property; this decree contained an express provision recognizing the purchaser's right to be made a party to any suit pending or brought after the sale to contest any claim or

demand. The obligation to make the purchaser a party arose at the date of the sale of all the property on February 11, 1930; it was a matter of public record for almost one full year before trial was begun on October 30, 1930; long before that date the receiver had been divested of every item of property, and he had filed his final report asking for his final discharge before said date; the District Court approved said final report and discharged the receiver without reserve on October 30, 1930. Judgment for plaintiff was not entered until December 22, 1930.

It is uniformly held that suits against a receiver are in effect only against the receivership; he is regarded as in the nature of a corporation sole; suits are against the funds or property in his possession, and judgments against him are payable only from the property in his hands, and his discharge entirely puts an end to his liability; judgments taken after his discharge are absolutely void, unless a statute provides otherwise. There is no such statute in Indiana.

The opinion of the Circuit Court of Appeals emphasizes the fact the Receiver did not give plaintiff any notice of his discharge. The plaintiff knew of the receivership when he brought his action against the receiver on July 1, 1928; he could obtain recognition of his claim only in the Court of the receivership; he knew that said proceeding was running to termination; he was required to proceed according to the provisions of the decree entered November 9, 1929. It should be here noted that there is not in the pleadings any averment nor in the evidence or findings any fact to the effect that plaintiff did not know and have full knowledge of the decree of November 9, 1929 or of the judgment discharging the receiver of October 30, 1930.

But whether the plaintiff or the state court knew of the discharge makes not the slightest difference. This Court

said in *Reynolds v. Stockton*, 140 U. S. 254, in which case a receiver was discharged before judgment was rendered against him,

“If it be said that the attention of the court in which the judgment in question was entered had not been called to this loss of representative power on the part of Parker (the receiver), a sufficient reply is, that if the power was gone, it is immaterial whether the court knew of it or not.”

The Court refers to the facts that subsequent to the entry of plaintiff's judgment in the State Court on December 22, 1930, the Receiver of the Chicago, South Bend & Northern Indiana Railway Company took an appeal to the courts of appeal of the State, and that the Receiver was also an officer of the purchaser.

The Court does not undertake to say upon what principle of law a judgment void when entered, becomes valid as against the purchaser of the property in the foreclosure sale, and as against Girard Trust Company, trustee, neither of which were parties to the original action or to the appeal, because of the acts and conduct of the receiver.

The decision of the Circuit Court of Appeals failed to point out any fact or applicable legal principle which made the decision in this cause an exception to the general rule; therefore the general rule established by the decisions of other Circuit Courts of Appeals and by a former decision of the Seventh Circuit, that a judgment taken against a receiver after his discharge is void should have been followed. The decision has so far departed from the accepted course of judicial proceedings as to call for an exercise of this court's power of supervision.

## POINT II.

**The Decision of the Circuit Court of Appeals Is Contrary to Decisions of This Court.**

*McMulta v. Lochridge*, 141 U. S. 327, 332.

In the above cited case it was stated:

“So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands.”

In this case by the judgment discharging the receiver the District Court completely relinquished its control over the property; before this suit was brought complete control and possession of all the property had been in the purchaser and its receiver appointed by the St. Joseph Circuit Court for more than six years. The Circuit Court of Appeals expressly holds that the District Court by its orders did not retain jurisdiction of the property, but on the contrary relinquished its hold upon the same. Notwithstanding this it held that a judgment rendered against the District Court's receiver after his complete discharge and after it had surrendered possession of all property, was valid.

The decision of the Circuit Court of Appeals offends against, and is not in harmony with the principles of said decision of this court. It has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

## POINT III.

**The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver of a Street Railway Corporation for Negligence Arising in the Operation of the Property, After His Discharge and After All the Trust Property Has Been Distributed by Him, Is Not Void, Is a Decision of an Important Question of Local Law, and Is in Conflict With Local Law.**

Whether the judgment rendered in the state court was void or not depends upon the state law of Indiana.

*Shepherd v. St. Louis Public Service Company*, 64 Fed. (2) 612, 615.

The decisions of the Supreme Court of Indiana declaring the law of this State are:

*Henry v. Claffey*, 189 Ind. 609.

*Johnson v. Central Trust Co.*, 159 Ind. 605.

The law of Indiana was declared in *Henry v. Claffey* as follows:

“It is well settled that an action for damages for personal injuries resulting from the negligent operation of property in the hands of a receiver cannot be maintained against a receiver in his individual capacity, unless the injury was the result of the personal negligence of the receiver. If the injury results from the alleged negligence of his employees engaged in operating the property under the control of the receiver, he is liable, if at all, in his official capacity, and no judgment can be rendered against him personally. The purpose of such a proceeding against a receiver in his official capacity is to reach the property or fund in his possession as receiver and to subject that to the payment of the demand.

When all of the trust property has been sold, and all the trust funds in the hands of the receiver have been distributed under the order of the court, nothing remains in the hands of the receiver or under his control

out of which any demand against him in his official capacity can be enforced; and after the receiver has fully administered his trust under the order of the court and has filed his final report and has been discharged, he no longer occupies the official character of receiver, and no valid judgment can be rendered against him in such capacity."

The order or judgment of discharge was unconditional and without any reservation as to existing claims. The Supreme Court of Indiana in *Johnson v. Central Trust Company* said:

"The effect, therefore, of a discharge of a receiver, and the surrender of jurisdiction over the trust, without any reservation as to existing claims, is to release not only the receiver, but also the property from further liability."

Notwithstanding these decisions of the local court the Circuit Court of Appeals not only held the judgment against the discharged receiver to be valid, but a lien upon the property and interests therein of petitioners who were not in any way parties to the proceedings. It disregarded the rule of Indiana Common Law, which was controlling and which should have determined the liability. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

#### POINT IV.

**The Decision of the Circuit Court of Appeals Which Holds That a Judgment Secured After the Discharge of the Receiver and Without Substitution of the Purchaser Is Valid Against the Purchaser, Is in Conflict With an Applicable Local Decision of the Supreme Court of Indiana.**

*Henry, Rec. v. Claffey*, 189 Ind. 609.

In said cause the court in its order of sale had retained jurisdiction to enforce against the property sold certain



claims arising out of the receivership. But the final judgment discharging the receiver and terminating the control of the court over the property was unconditional. The order of sale gave the purchaser the right to appear in any pending action and contest a claim. It was not made a party, and no notice was given it. The facts were identical in said respects with the facts of the present case.

Said court held that (p. 622):

“A claimant’s proceedings thereunder are analagous to an action *in rem* and it is well settled, that in order to give a court full and complete jurisdiction *in rem*, some form of notice must be given to parties whose rights and interests may be affected by the decree; and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. Therefore the purchaser and those in possession of the railroad after the sale—whose interests would be affected by the decree establishing a claim against the property—must have notice of such claim and the presentation of it to the court; and thereafter it is competent for the court, if the claimant is by law entitled to a lien, to establish the same against the property, and to fix a time for the payment of the sum found to be due; and in default of payment at the specified time to prescribe a proper order of sale.”

“Notice” as the term is here used means legal process. But the decision of the Circuit Court of Appeals substitutes mere knowledge of the pending suit by the purchaser or its agents for notice. It is not an equivalent, and does not meet the requirements of due process of law. As is well said in *National Metal Co. v. Greene Cons. Copper Co.*, 11 Ariz. 108, 89 Pac. 535,

“A distinction is to be observed between knowledge of the pendency of a suit and notice thereof. Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by actual service or by constructive service.”

Both by the terms of the decree and under well established principles of equity the purchaser must be substi-

tuted as a party where the receiver has been discharged; this is indispensable before any lien can be cast against the property in the purchaser's possession.

The purchaser was not made a party and there was no legal process or notice to it.

Not only is said decision in conflict with the local law of Indiana but it amounts to the taking of the property of the petitioners without due process of law.

#### POINT V.

**When the St. Joseph Circuit Court Took Possession of All the Property of Northern Indiana Railway, Inc. Through Its Receiver Appointed December 28, 1931, It Thereby Withdrew All Said Property from the Jurisdiction of Other Courts.**

It is impossible to determine whether the effect of the decision of the Circuit Court of Appeals is that the lien claimed by the plaintiff was established by the foreclosure decree of the District Court in the receivership of the Chicago, South Bend & Northern Indiana Railway Co., or by "the judgment of this court" (meaning the Circuit Court of Appeals) see opinion of June 28, 1940 (R. 154).

Of course the Circuit Court of Appeals could not create one by any original order, and whether plaintiff had a lien was a controversy exclusively cognizable in the St. Joseph Circuit Court.

Neither the District Court nor the Circuit Court of Appeals had the power to retake jurisdiction of the property, declare that plaintiff had a lien thereon, and that the same was prior to the liens of others. The St. Joseph Circuit Court had by appropriate proceedings taken the

property into its possession, and thereby it withdrew the same from the jurisdiction of all other courts.

*Lion Bonding Co. v. Karatz*, 262 U. S. 77.

*Shields v. Coleman*, 157 U. S. 168.

*Ex parte Baldwin*, 291 U. S. 610.

*Field v. Kansas City Ry. Co.*, 9 Fed. (2) 213, 215.

*Reconstruction Finance Corp. v. Zimmerman*, 76 Fed. (2) 313, 316.

The State court had had complete possession and control over the property from December 28, 1931, more than four years before the commencement of this suit in the District Court on February 14, 1936. The possession was actual and continuous. The possession of the res by the State court disabled other courts of co-ordinate jurisdiction from exercising any power over it; the State court first acquired jurisdiction through possession of the property, and it became vested with exclusive jurisdiction to determine all controversies relating to said property; it was and is the exclusive business of the St. Joseph Circuit Court to determine whether upon the records as made in plaintiff's negligence case and in the foreclosure decree plaintiff had a lien upon the property acquired by Northern Indiana Railway, Inc.; it was the exclusive right of said State court to determine whether any such lien had priority over and above the mortgage of Girard Trust Company, Trustee, and to determine its priority, if any, as against wages and material claims.

The decision of the Circuit Court of Appeals expressly states that:

"We have diligently searched the decree for reservations of jurisdiction to grant the relief sought \* \* \* We do not believe the reservation of jurisdiction for the purpose of enforcing the provision of this decree, included or was intended to include matters of execu-

tion upon the property upon which plaintiff's judgment was made a lien or to pass upon questions not raised at the time of its entry—of priority of judgment liens over the mortgages.”

If the District court did not retain jurisdiction, as the Circuit Court of Appeals holds, then in this suit, the property having been withdrawn from the District Court's jurisdiction by the unconditional discharge of its receiver, and by the subsequent receivership of the same property in the St. Joseph Circuit Court, there was a complete lack of power both in the District Court and in the Circuit Court of Appeals to entertain jurisdiction for any purpose.

The attempted distinction that although the receivership in the St. Joseph Circuit Court withdrew from other courts the power to enforce a lien, it did not withdraw from other courts the power to *determine and establish* a lien, has no support in the decisions of this court or of any other Federal Court. Such a distinction would completely destroy the equity powers of the receivership court to administer the trust.

The decision of the Circuit Court of Appeals contains this provision (R. 154).

“That plaintiff may proceed to endorse his judgment in the United States District Court if consent be granted by the Indiana State Circuit Court, and in case such consent is not given, said plaintiff may proceed and is authorized to proceed in said state court *as fully as he could in this Court to enforce his said judgment lien against the property,*” etc. (Italics ours.)

If the St. Joseph Circuit Court gives its consent to the enforcement of the lien in the District Court, the latter court must necessarily determine what property shall be sold, the priority of that lien over mortgages, material and labor claims, and all other demands and liens; the holders of such mortgages, material and labor claims, and

other demands would have no opportunity to contest plaintiff's alleged lien, its priority and order of payment; they would not have the right of appeal; they would have all of said rights in the State Court, but would have none of them in the District Court.

If the St. Joseph Circuit Court does not give consent to enforcement in the District Court, then it is mandated that plaintiff may enforce his lien in said state court "as fully as he could in this court." All right of judicial determination is taken away from the St. Joseph Circuit Court, no consideration whatever is to be given the orders and decrees of said Court barring claims and liens, establishing priorities and vesting title to the property in a purchaser at a sale ordered by it; material and labor claimants, other lien holders, purchasers of property and the purchaser's mortgagee, are to have no hearing whatever.

The decision carries upon its face the seeds of destructive judicial conflict; the enforcement of such a judgment would be in defiance of established legal rights, and would be the taking of property without due process as guaranteed by our Federal Constitution.

Plaintiff himself recognized that jurisdiction of his claim was in the St. Joseph Circuit Court; he invoked the jurisdiction of the St. Joseph Circuit Court for the allowance of his alleged claim by filing in the receivership proceedings in said court on September 12, 1933 his petition, which contained averments of practically all the facts contained in the complaint in this case, and asked said Circuit Court to "protect and preserve the lien of this petitioner as a first, paramount and senior lien" (R. 116-118). This petition was never disposed of, but while it was pending plaintiff filed this suit February 14, 1936. This proceeding, if timely brought, was the proper way to assert his claim. But as held in *Lion Bonding Co. v. Karatz*, 262

U. S. 77, he could not by the filing of this suit in the District Court attack collaterally the orders and decrees of the State Court made in the administration of the trust.

This court has definitely settled the question that where one court of competent jurisdiction has taken property into its possession, the property is thereby withdrawn from the jurisdiction of all other courts; an important question arises in the opinion and decision of the Circuit Court of Appeals whether its limitation upon said rule, to-wit: that while other courts do not have jurisdiction to enforce liens against the property, they do have jurisdiction to determine and establish liens thereagainst, is valid; the question is raised in this record, and should be settled by this court.

#### POINT VI.

#### **The Decision of the Circuit Court of Appeals Holding That Plaintiff Has a Lien on the Property Is in Conflict With the Decision of This Court.**

*Riehle v. Margolies*, 279 U. S. 218.

The judgment rendered in the State Court against the Federal Receiver did not give plaintiff a lien upon property; it was a judgment *in personam* and merely established the existence and amount of his claim.

The foreclosure decree of the District Court did not give to plaintiff's judgment any lien. It provided that "all liability for negligence claims not now reduced to judgment shall be valid as against the property of said railway company at the sale herein ordered *made to the same extent as though any judgment thereon had been recovered prior to the sale.*" (Italics ours.)

Obviously if it had been rendered "prior" to the sale it would not have created a lien. Therefore by the express provisions of the decree it did not create any.

This provision of the decree has to be construed with another provision of the decree (R. 104), which provides for the barring of claims with certain exceptions. One exception is:

“Any claims which may accrue after the entry of this decree and/or which may thereafter be proved *nunc pro tunc* by the permission of this court.”

This provision plainly means that the judgment of the State Court had to be brought to the Federal Court by way of intervention in the receivership proceeding for allowance *nunc pro tunc*, that is for proof and allowance as if it had been rendered prior to the sale. Plaintiff never has so intervened as required by said decree.

That the decision of the Circuit Court of Appeals is in conflict with decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

#### POINT VII.

**If There Was Any Lien Cast Upon the Property of the Railway It Was Because of the Provisions of the Foreclosure Suit in the District Court and the Negligence Action in the State Court; the Petitioner Girard Trust Company, Trustee, Was Not a Party to Either of These Causes; the Decision of the Circuit Court of Appeals That Its Judgment Is a “Valid Adjudication” as to Said Girard Trust Company, Trustee, Is a Taking of Its Property Without Due Process of Law.**

Due process was defined by this Court in *Ochoa v. Hernandez Y Morales*, 230 U. S. 139 as follows:

“Without the guaranty of ‘due process’ the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was

embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The mortgage lien of Girard Trust Company, Trustee, against the property came into being January 1, 1900; it was in no way a party to the foreclosure proceedings in the District Court; the property was sold under the decree subject to said mortgage; the District Court was wholly lacking in jurisdiction to make any decree that would disturb its mortgage lien, to give anyone priority over it, or to affect it in any way.

As it was not a party to the foreclosure proceedings, obviously the District Court could not by its decree affect petitioner's rights therein; and therefore since this proceeding was nothing more than one for the construction of the terms of that decree, it could not here be adjudged that plaintiff has a valid judgment as against this petitioner. The decree of foreclosure expressly gives priority even to second and third mortgages over such claims as plaintiff's (R. 103 (d)); it was only in the receivership proceedings in the District Court that plaintiff could have been given any priority. The decision of the Circuit Court of Appeals not only construes the foreclosure decree contrary to its express terms, but it undertakes to adjudge upon a subject where it had no jurisdiction.



### Conclusion.

It is thereforre respectfully submitted that the questions which the petition suggests should be definitely settled by this court, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Seventh Circuit and finally reverse it, and order the affirmance of the judgment of the United States District Court.

Respectfully submitted,

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